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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-500

LOWELL M. BIRRELL,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1971

No.

LOWELL M. BIRRELL,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associates Justices of the Supreme Court of the United States:

The Petitioner, Lowell M. Birrell, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming the judgment entered against him on September 8, 1971.

A. The Opinion Below

On September 8, 1971, the Petitioner's appeal to the United States Court of Appeals for the Second Circuit was affirmed and a copy of the Opinion is annexed hereto and marked as Appendix A.

B. Jurisdiction

The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1) on the ground that review by the

Supreme Court by Writ of Certiorari is sought of a judgment of the affirmance on appeal by the United States Court of Appeals for the Second Circuit.

C. Questions Presented

1. Whether or not the Fifth Amendment mandates acquittal of the Petitioner or in the alternative an evidentiary hearing to determine if the Grand Jury passed on the actual terms of the indictment, the Government never having either admitted or denied the fact and the Grand Jury minutes being silent on the issue [1]

2. Whether or not the Fifth Amendment mandates that Petitioner should have been either acquitted or in the alternative given a new trial on the ground that trial court's supplemental charge to jury was coercive.[1]

3. Whether or not Fifth Amendment and Sixth Amendment rights of Petitioner to cross-examine witnesses and to confront accusers were denied to him since trial court permitted one Government witness in response to cross-examination the Court held to be relevant take the Fifth Amendment privilege and another witness in response to cross-examination the Court held to be relevant take the lawyer-client privilege.[2]

D. Constitutional Provisions and Statutes

Fifth Amendment; Sixth Amendment; Rule 19, Supreme Court Rules; Title 28, United States Code, Section 1254(1); Title 28, United States Code, Section 1343.

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[1] The Petitioner, in his Petition, contends *infra* herein, that with particular reference to Questions Presented "1" and "2" as set forth above that there is serious and substantial diversity as to constitutional law now existing beween the various circuits.

[2] The Petitioner, in his Petition, contends *infra* herein, that with particular reference to Question Presented "3" as set forth above that there is serious and substantial prejudicial error by the trial court, which should be reviewed by the Supreme Court in the exercise of its supervisory power.

E. Statement of the Case

The Petitioner, Lowell M. Birrell, was convicted in the United States District Court for the Southern District of New York before the Honorable Frederick vanPelt Bryan and a jury on one count of transmitting in interstate commerce wire communications for the purpose of executing a fraudulent scheme, in violation of Title 18, United States Code, Section 1343. The Petitioner was sentenced to two years' imprisonment. The Petitioner had also been indicted on one count of conspiracy to commit mere fraud and on another count of wire fraud, but a verdict of acquittal was directed on both counts by the trial court.

REASONS FOR GRANTING THE WRIT

POINT I

The Fifth Amendment mandates that the Grand Jury pass on the actual terms of any indictment. *Gaither* v. *United States,* 413 F.2d 1061 (D.C. Cir., 1969).

Under the Fifth Amendment, Petitioner was entitled to have the Grand Jury pass on the actual terms of the Indictment purportedly returned in this case. An indictment is invalid unless its actual terms have been passed on by the Grand Jury.

In the leading case, *Gaither* v. *United States,* 413 F.2d 1061 (D.C. Cir., 1969), a Grand Jury presentment was followed by an indictment which had been drafted by the United States Attorney and signed by the Grand Jury foreman without ever being submitted to the Grand Jury as a whole.* The defendants were subsequently tried and

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* The Federal Rules of Criminal Procedure make no provision for prosecution by presentment.

convicted, and they appealed. The Court of Appeals, in an opinion by Judge Wright, held that Supreme Court cases interpreting the Fifth Amendment require the Grand Jury as a whole to pass on the actual terms of an indictment.

Apart from its reliance on the express provisions of Rule 6 of the Federal Rules of Criminal Procedure, the court stated that its holding was impelled by Supreme Court cases under the Fifth Amendment emphasizing the right of an accused to be tried on an indictment which, in each material respect, has been passed on by a Grand Jury. See *Ex Parte Bain,* 121 U.S. 1 (1887); *Stirone* v. *United States,* 361 U.S. 212 (1960); and *Russell* v. *United States,* 369 U.S. 749 (1962).

Petitioner's contention that he is entitled to a hearing is supported by (1) the Government's failure, even after repeated direct invitations to do so,* to categorically deny the assertion that the Grand Jury did not actually pass on the terms of the Indictment; (2) the seriatim amendments to the Bill of Particulars and the proof itself metamorphasizing co-conspirators to victims and defendants to innocents; and (3) the striking inconsistencies between the testimony elicited by the Government before the Grand Jury and the petit jury, and the terms of the Indictment.

By timely motions before Judge Frankel and Judge vanPelt Bryan, Petitioner challenged the validity of the Indictment under *Gaither* v. *United States, supra.*

The Government steadfastly avoided a denial of Petitioner's assertion that the Grand Jury did not pass on the terms of the Indictment in this case. Instead, in its Affidavit in Opposition dated November, 1969, the Gov-

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* April 7, 1970 transcript, p. 10; May 25, 1970 transcript, p. 3; Tr. 1492-93, 1501.

ernment ignored Petitioner's assertion.* Similarly, in its undated Memorandum of Law opposing Petitioner's pretrial motions (Document No. 14 in Index to Record on Appeal), the Government avoided responding directly to Petitioner's contention. At other junctures, the Government with something less than candor would merely assert that the Assistant United States Attorney is not present during the actual vote of the Grand Jury—implying to the Court that the Assistant United States Attorney would not know whether he had prepared a draft of an indictment to give to the Grand Jury for its inspection, deliberation and vote (April 7, 1970 transcript, p. 17).

Ultimately, in response to Petitioner's pretrial motions before Judge vanPelt Bryan the Government presented at the court's request a certificate stating that a sufficient number of grand jurors concurred in "the finding of an indictment." Based on this certificate and on the fact that the *Gaither* application had been twice before denied in the case at bar, the Court denied Petitioner's motion (May 25, 1970 transcript pp. 22-23).

Nevertheless, the certificate *did not* substantiate that the Grand Jury had voted or passed on the actual terms of *the Indictment.*

The certificate, as it is quoted in the record, merely supports the conclusion that the Grand Jury voted *to indict* the Petitioner:

> "Sufficient number of the grand jurors concurred in the finding of an indictment charging the above-

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* Where the Government was capable of making a denial in this case it did so, consistent with its practice in other cases. See paragraph 31 of Affidavit in Opposition dated November, 1969 where the Government denied the use of wiretaps or electronic eavesdropping in connection with this case. See also *United States* v. *Casanova,* 213 F. Supp. 654, 657 (S.D.N.Y. 1963) and *United States* v. *Kahaner,* 204 F.Supp. 921, 972 (SD.N.Y. 1964) where the respective defendants were seeking to suppress wire tap evidence and to dismiss an indictment. In these cases the Government made the denials obviously required by the challenges made.

> named defendant with violation of 18 United States Code Section 371, 2 and 1343'' (May 25, 1970 transcript, p. 22).

Pursuant to *Gaither*, a mere vote to indict without further action by the Grand Jury as a whole would not sustain the Indictment. The Government's failure to deny that the Grand Jury did not actually pass on the terms of the Indictment constitutes sufficient grounds for this Court to remand for a hearing.

The Government's artful avoidance of squarely meeting the factual issue raised by Petitioner in this case suggests problems similar to those in *Coplon* v. *United States,* 191 F.2d 749 (D.C. Cir., 1951), *cert. denied* 342 U.S. 962 (1952), where the Government similarly avoided for years admitting the assertions of the defendant unsupported by evidence, but when finally sent back by the Court of Appeals for a hearing on the question of invasion of her right to counsel, admitted the truth of the assertions the Government had been sidestepping throughout.

The Court of Appeals in *Coplon* remanded the case for a hearing to determine whether the allegations of improper tapping of telephone conversations between the defendant and her attorney had taken place. The issue raised by her, like the issue raised here by Petitioner is one of constitutional dimension. It should not be resolved by fancy footwork on the part of Assistant United States Attorneys.

If the Grand Jury did not pass on the actual terms of the Indictment, Petitioner's right to Indictment by a Grand Jury was violated. *Gaither* v. *United States, supra.*

The Government has already admitted in this case (May 25, 1970 transcript p. 6) that the Grand Jury minutes would not reflect one way or the other, whether the Grand Jury passed on the actual terms of the Indictment. See also Rule 6(d) of the Federal Rules of Criminal Procedure.

Was this an Indictment returned by the Grand Jury on a complaint drafted by the United States Attorney's office?

Compare, *Stirone* v. *United States,* 361 U.S. 212, 215-218 (1960); *Russell* v. *United States,* 369 U.S. 749, 765 (1962).

The Government's resorting to merely chastising defense counsel for raising the *Gaither* issue on hearsay (May 25, 1970 transcript, p. 10) and the lower court's similarly evidenced attitude (Memorandum, December 16, 1969, Frankel, Jr., p. 2 — SA 14a) hardly answer the problem. The propriety of former Government attorneys submitting affidavits on behalf of litigants against the Government based on information or knowledge obtained while employed by the Government had already been questioned in the Southern District. *United States* v. *Greater Blouse, Shirt and Neckwear Contractors Ass'n,* 228 F.Supp. 483, 487 (S.D.N.Y. 1964). The denial of the hearing sought effectively insulates any practice in which a United States attorney wishes to engage from all review, including appellate review. In the circumstances, Petitioner should have been granted the hearing he demanded, and this case should be remanded for that purpose with a direction that, if the Grand Jury did not in fact review the actual Indictment against him, the Indictment be dismissed.

POINT II

The Fifth Amendment and the Sixth Amendment both mandate that a criminal defendant be afforded the full protection of a jury unfettered, directly or indirectly. *United States v. Fioravante,* 412 F.2d 407 (3rd Cir., 1969).

The jury in this case began deliberating at approximately 1:00 P.M. on June 17, 1970. In mid-afternoon of its second day of deliberations, the jury sent to the Court a note (Court's Exhibit 16—SA 70a; Tr. 1911-12) stating as follows:

> "Your Honor,
>
> We have argued, deliberated, spoken individually, spoken in groups, discussed each piece of evidence

we can think of as having *any* bearing on the specific charge involved.

After more than 11 hours of honest, and we think responsible, deliberation, there are very basic disagreements. Each side has there [*sic*] own arguments and no amount of discussion has beeen able to sway either side.

After our seventh vote, the count was:

Guilty—4
Not Guilty—8

What suggestions do you have as to what we can do further. We are not even close!"

Over the objection of the defense, the Court delivered a supplemental charge as follows:

"Madam Foreman, and ladies and gentlemen, there's no doubt in my mind that this is a very conscientious jury which is trying and has tried very hard conscientiously to reach a verdict in this case.

As you recall, ladies and gentlemen, this case has been tried before this Court and jury now for some two and a half weeks or more than two and a half weeks. It is eminently desirable here that you reach a verdict in this case if you possibly can. The case is an important one for the parties, both parties, it involves a great deal of time and effort on the part of both sides, the lawyers for both sides, it involves a great deal of time and effort on the part of the Court, and indeed on the part of all you jurors yourselves.

If you fail to bring in a verdict here the case will have to be tried before another jury selected in the same manner as you ladies and gentlemen were selected and from the same sources; and I see no reason to suppose that another jury would be more competent to determine the issues here than you ladies and gentlemen are.

It's highly desirable and it's your duty to reach a verdict here if you possibly can.

By pointing out the desirability of your reaching a verdict in this case and your duty to do so,

if you possibly can, I am not suggesting that any of you should surrender any conscientious convictions you may have as to where the truth lies here or as to the weight and effect of all of the evidence, or as to what verdict should be returned.

However, while each of you must decide the case yourselves, and not merely acquiesce in the conclusion of your fellow jurors, you ought to examine the issues before you with candor and frankness again and with proper deference to and in regard for the opinions of one another.

I will put it to you this way, and I am quoting from an opinion of the Supreme Court of the United States which deals with a situation of this kind.

> 'You should examine the questions'—and I'm quoting—'You should examine the questions submitted to you with candor and with a proper regard and deference for the opinions of each other. You should listen to each other's views with a disposition to be convinced. That does not mean that you should give up any conscientious views which you hold. But it is your duty after full deliberation here to agree upon a verdict if you can do so without violating your individual judgment and your individual conscience.'
>
> And I am going to ask you to go back at this thing and work at it again. It's important that a decision be reached here—that is, a verdict be reached here, that is what I mean by your decision —and *I am frank to say that I see no reason why a verdict cannot be reached.*
>
> I am going to send you back to go at it again, ladies and gentlemen." (Emphasis added.)

Thereafter, at 3:45 P.M., the jury resumed deliberating and at 6:20 P.M. announced that it had reached a verdict.

The supplemental charge to the jury was a modified version of the so-called "*Allen* charge" which has its genesis in *Allen* v. *United States,* 164 U.S. 492 (1896).

The Second Circuit continues to recognize the validity of the *Allen* charge, in its pure and modified forms, despite repeated attacks on its validity.*

Here, the supplemental charge unduly coerced the jury into returning a guilty verdict. This conclusion is apparent in view of the jury's reaction to the charge, a reaction which resulted from the context in which the charge was given and its content. For example, a juror had inquired of the Court about an hour before its announced deadlock what would happen if no decision were reached that day, and the Court responded that it was not going to make any predictions (Tr. 1911).

In view of the vote prior to the charge, it is highly unlikely that the minds of eight jurors would be changed so quickly absent a coercive influence. *Cf., United States* v. *Kahaner,* 317 F.2d 459, 484 (2d Cir. 1963).

The Third Circuit, in *United States* v. *Fioravante,* 412 F.2d 407 (3d Cir., 1969), has seen fit to dispense altogether with the *Allen* charge as inherently improper. It is respectfully urged that its use in this case considering the facts and circumstances here, demonstrates conclusively its coercive nature, and is ample justification for this Court to reconsider the conclusion the Second Circuit has reached in *Bowles, supra,* and other cases. Because of the prejudice inherent in the *Allen* charge, *Fioravante, supra,* Petitioner's conviction must be reversed and remanded for a new trial.

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* The Court of Appeals for the Second Circuit has considered and upheld the validity of the *Allen* charge in at least seven cases in the last seven years. See *United States* v. *Bowles,* 428 F.2d 592 (2d Cir. 1970) and cases cited on page 595, note 9.

POINT III

The Fifth Amendment and Sixth Amendment both mandate reversal of a judgment of conviction if the right of a defendant to cross-examine is unreasonably limited. *United States* v. *Cardillo*, 316 F.2d 606 (2nd Cir., 1963).

The trial was beset by fundamental denial of Petitioner's Sixth Amendment right to effective confrontation of his accusers* and denial of his Fifth Amendment right to due process of law**.

The principal question in this case was whether Petitioner had an ownership interest in stock pledged to a Cincinnati Bank or whether as the Government claimed in its opening to the jury, Birrell "took some *stock that did not belong to him*" (Tr. 37) [Emphasis added] and defrauded a bank by pledging such stock for a loan.

In the examination of prosecution witness Daniel Greenberg, who before trial represented as attorney other prosecution witnesses, defense counsel was met with a claim of attorney-client privilege. Greenberg was then excused and left for Europe. At this point, the Government stated that if Greenberg were called back, he would testify that his client, one Re, another prosecution witness, had shown him documents which evidenced the withdrawal of $35,000 from a Swiss bank account (Tr. 880, 1449).

On examination of Re, while he denied that he had paid for the stock, and asserted that the stock had been paid for by a person dead at the time of trial (Tr. 1109-1110), he took the Fifth Amendment when asked: "Did [the services

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* "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." (U.S. Const. Amndt. VI.)

** No person shall . . . be deprived of life, liberty, or property without due process of law. . . ." (U.S. Const. Amndt. V.)

rendered by Borre*] include maintaining or taking care of any European bank account for you." (Tr. 1085) and he also cut off any inquiry into his Swiss bank account when he again asserted the Fifth Amendment when asked if, "in January of 1966 you had more than $1,000,000 in a Swiss Bank?" (Tr. 1086) and again whether a Dr. Lanz took care of his Swiss banking accounts. (Tr. 1107)

These were foundation questions leading to a demonstration through the Government's own witness that Re's entrusting the Petitioner with the stock and the Petitioner's subsequent use thereof was entirely consistent with his innocence.

Because Birrell was deprived of his fundamental right to cross-examine Greenberg and Re on this key issue, the Trial Court's denial of Birrell's motion to dismiss the Indictment or alternately to declare a mistrial was reversible error (Tr. 1261-1263, 1493).

To block the development of affirmative evidence on cross-examination when such evidence would contradict direct testimony to the contrary is to deny cross-examination and to violate the Sixth Amendment. *United States* v. *Cardillo,* 316 F.2d 606 (2d Cir. 1963).

Here, as in *Cardillo,* the opportunity to trap the wit-—nesses in direct lies was thwarted, in the one instance by invocation of the Fifth Amendment, and in the other by the attorney-client privilege.

Here, as in *Cardillo,* the answers solicited "might have established untruthfulness with respect to specific events of the crime charged." *Cardillo, supra,* at p. 613.

Under *Cardillo,* if a defendant is prevented by privilege from testing a witness' direct testimony as to key issues, *such as whether or not a loan was made* (emphasis added), the defendant is entitled to relief:

> "If the proof were sufficiently convincing to induce a belief that the loan had never been made,

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* The dead person.

> the court's reaction to all of [the witness's] testimony might have been so adverse that it would have accepted no part thereof. *Disclosure of a direct lie relating to the events testified to might have had far more influence on the court's ultimate decision than testimony merely establishing the unsavory character of the witness by admission of prior crimes.*" *Cardillo, supra,* at p. 613. (Emphasis added.)

Under *Cardillo,* there is no room for doubt that Birrell was frustrated in his attempt to adduce material evidence on cross-examination.

Moreover, the Government explicitly conceded below that, under *Brady* v. *Maryland,* 373 U.S. 83 (1963) and *Napue* v. *Illinois,* 360 U.S. 264 (1959), evidence that Re had paid for the stock was material. (Tr. 880) So did the trial court (Tr. 860).

In a criminal case it is a defendant's time-honored and constitutionally guaranteed prerogative to rely upon his right to probe and discredit by cross-examination the Government's case against him. The right to cross-examine and its sweeping scope has been given plenary judicial protection.

> "It is the essence of a fair trial that reasonable lattitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop." *Alford* v. *United States,* 282 U.S. 687, 692 (1931).

> "Cross-examination of a witness is a matter of right. . . . [Citations omitted] . . . Indeed, cross-examination, as has often been observed, is the surest test yet devised of a witnesses' testimony, and its allowance is especially important in the case of a witness who is himself an admitted violator of the law." *Montgomery* v. *United States,* 203 F.2d 887 (5th Cir. 1953).

Birrell was deprived by truncated cross-examination of crucial discrediting testimony, and inferences therefrom, to which he was entitled. This is reversible error, and no prosecutorial legerdemain is going to make that error disappear.

Before Re testified, counsel for Birrell informed the trial court that his principal effort on cross-examination of Re would be to demonstrate that Re's contention that Borre had put up the money was a lie (Tr. 940-941). The Court had already acknowledged the possibility that Re's testimony might have to be stricken "in its entirety" should the witness invoke the Fifth Amendment (Tr. 853-855). To avoid irreparable prejudice from Re's invocation of the Fifth Amendment, Birrell's counsel requested a preliminary hearing of Re's testimony,* and requested alternatively that the witness be granted immunity. Without stating reasons, the Court below erroneously denied both requests (Tr. 1003-1006).

Once Re asserted his privilege, Birrell moved twice for a dismissal or alternatively for a mistrial in view of the irreparable nature of the prejudice and cited *Cardillo* (Tr. 1261-1263, 1493). It would have been incomprehensible to request merely a curative instruction for the jury to disregard Re's testimony.**

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* The Supreme Court has favorably reacted to the technique of a "preliminary hearing of the witness's testimony outside the hearing of the jury," as a device to protect a defendant from unnecessary prejudice arising from a Government witness' invocation of the Fifth Amendment. *Namet* v. *United States,* 373 U.S. 179, 190n.9 (1963).

** See *Bruton* v. *United States,* 391 U.S. 123, 135 (1968):

> "There are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. . ."

What could be more obvious in American jurisprudence than that the petitioner was entitled to adequate cross-examination in order to show that the Government's theory of ownership was fabrictaion? The petitioner's objective at trial was to discredit the Government's theory of stock ownership by trapping its propounders—Re and Greenberg—in their lies, and explaining his innocent presence in the scenario.

Because Birrell was denied his right to cross-examine on this central issue, the conviction must be reversed.

CONCLUSION

For the reasons here and above set forth this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix A

(Opinion of the United States Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 951—September Term, 1970

(Argued June 2, 1971 — Decided Sept. 8, 1971)

Docket No. 35191

UNITED STATES OF AMERICA,

Appellee,

v.

LOWELL M. BIRRELL,

Appellant.

Before:

CLARK, *Associate Justice*,* SMITH, *Circuit Judge*, and ZAVATT, *District Judge*.**

Appeal from conviction and sentence on charge of wire fraud, in violation of 18 U.S.C. § 1343, on trial to the jury in the United States District Court for the Southern Distrist of New York, Frederick van Pelt Bryan, *Judge*. Affirmed.

ROBERT L. CLARE, JR., New York, N. Y. (William B. Pennell, Allin C. Seward, III and Elliot A. Taikeff, New York, N. Y., of counsel), *for Appellant*.

JOHN M. WALKER, JR., Asst. U. S. Attorney (Whitney North Seymour Jr., U. S. Attorney for the Southern District of New York, John H. Doyle, III, Walter M. Phillips, Jr. and Jack Kaplan, Asst. U. S. Attorneys, of counsel), *for Appellee*.

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* Retired Associate Justice of the Supreme Court, sitting by designation.

** Senior District Judge for the Eastern District of New York, sitting by designation.

Appendix A

SMITH, *Circuit Judge*:

Defendant Lowell M. Birrell appeals from a judgment of conviction entered after a jury trial in the United States District Court for the Southern District of New York (Frederick van Pelt Bryan, *Judge*). He was found guilty of transmitting in interstate commerce wire communications for the purpose of executing a fraudulent scheme, in violation of 18 U.S.C. § 1343. Defendant was sentenced to two years imprisonment. He had also been indicted on one count of conspiracy to commit wire fraud and on another count of wire fraud, but a verdict of acquittal was directed on both counts by the trial court. We find no error and affirm the judgment.

The thrust of the government's charge against Birrell was that he had "issued" unauthorized stock certificates in a virtually defunct public corporation, which he caused to be pledged as collateral for a bank loan, misrepresenting the certificates as genuine. According to the government's case at trial, Birrell in 1965 became interested in acquisition of Drug Products Company, Inc., an inactive manufacturer of drug products. At the time there were 1,000,000 shares outstanding, 735,662 owned by Hugh Begley and the rest owned by members of the general public. Birrell allegedly approached Gerard A. Re and his son, Gerard F. Re ("Re") and the three agreed to purchase the Begley shares. The group enlisted Charles Dressen, baseball manager and friend of the Res, to make the purchase. Re arranged an advance of funds from his cousin, Peter Borre, to Dressen totaling $35,000, most of which was used to purchase the shares. Dressen delivered the shares to Re.

In April of 1966, three months after the acquisition, Birrell went to the company's offices and obtained a Drug Products stock book containing unissued certificates. Birrell desired to obtain a bank loan, using 100,000 shares as collateral. He had Patricia Livermore, a friend, contact Lawrence Davis, a vice-president of the First National

Bank of Cincinnati, who agreed to lend her $5,000 on the security of 100,000 shares of Drug Products and 100 shares of another company. Mrs. Livermore agreed to turn over the proceeds to Birrell. The bank received the 100,000 shares, which had been removed from the stock book taken by Birrell. The shares were made out in the name of C. Whitney, a former houseboy and handyman for Birrell who had become Birrell's personal secretary. They had been endorsed in blank with the name Carter Whitney. The issuance of these shares had never been authorized, and therefore, argued the government, they were entirely worthless, a fact obviously not known by the bank which had accepted them as collateral. Davis wired the $5,000 to Mrs. Livermore in New York.

In its summation to the jury, the defense argued that Birrell was unaware of what Whitney was doing, and that any criminal activity had been performed solely by the latter. The only evidence introduced by the defense at trial was the stipulated testimony of Re's attorney that he had seen documents indicating that $35,000 had been withdrawn from a Swiss bank account maintained by the Res about the time of Dressen's purchase of the Begley shares. On appeal, Birrell alleges the commission of a number of errors at trial.

I. Right of Confrontation:

Birrell contends that he was denied his Sixth Amendment right of confrontation when Re refused to answer questions on cross-examination on the basis of his Fifth Amendment privilege against self-incrimination. Re had appeared as a witness for the prosecution, testifying that Birrell owned none of the stock of Drug Products and that it was all owned by Dressen, who had received his money from Re's cousin, Borre. On cross-examination, the de-

fense attempted to ask Re about his Swiss bank account. Specifically, the questions were the following:

> "Did [the services rendered by Borre] include maintaining or taking care of any European bank accounts for you?"
>
> "Is it not true, sir, that . . . in January of 1966, you had more than $1,000,000 in a Swiss bank?"
>
> "Does Dr. Lanz take care of your Swiss banking accounts?"

The defense was apparently attempting to establish that it was not Borre's money given to Dressen to purchase the Begley shares, but rather his own, out of his Swiss bank account. Why such a showing would be at all helpful to Birrell, save perhaps for its impeachment value since Re had denied that his funds were involved in the purchase, is unclear.

Birrell argues that the defense's contention was that Whitney or Birrell through Whitney in fact owned 25% of the former Begley stock by virtue of the four-man joint venture agreement between the Res, Dressen and Whitney, entered into in contemplation of obtaining the Begley stock. Since Birrell was entitled to one-quarter of the shares, the loan collateral was not worthless, the argument maintains. The most that could be said is that the shares were slightly irregular, since they had not been officially authorized at the time. This, Birrell contends, was only a minor technicality. We need not consider the government's suggestion that this theory was never presented at trial and indeed was inconsistent with the defense claim that Whitney was alone responsible for any criminal activity, Birrell being totally unaware of his actions. Nor is it necessary to accept the government's position that the mere fact of Birrell's participation in the four-man joint venture agreement does not automatically entitled him to one-quarter of the shares unless the agreement so dictates. The simple fact of the matter is that the ques-

tions posed to Re bore no relevance whatsoever to the theory Birrell now argues was the justification for posing the questions. Whether the money advanced to Dressen came from Borre or from Re in no way determines whether Birrell had a legitimate legal right to the shares. See, *United States* v. *Cardillo,* 316 F.2d 606, 611 (2d Cir.), *cert. denied,* 375 U.S. 822 (1963), holding that a refusal by the trial court to strike the testimony of a witness who on cross-examination took his Fifth Amendment privilege when asked about collateral matters was not error. Since the most that the answers to the defense questions could have produced was impeachment of credibility on matters not directly in issue at trial, the questions concerned collateral matters, and there was no error in excluding them. It is true that the federal conviction will be reversed if the right of the defendant to cross-examine is unreasonably limited, see, e.g., *United States* v. *Masino,* 275 F.2d 128 (2d Cir. 1960), but the minimal prejudice possibly caused to defendant in this case would not constitute grounds for reversal, even if we found error in the ruling.

II. Variance of proof from Bill of Particulars:

The government indicated in its bill of particulars that it would show at trial that the person who transmitted the stock certificates to the bank in Cincinnati was Patricia Livermore. At trial, the government introduced no direct proof on the issue, and the only inference established was that Birrell himself had caused the stock certificates to be transmitted to the bank. Thus it appears that there was a variance from the bill of particulars.

A variance from the bill of particulars, however, will invalidate a conviction only if real prejudice has been caused defendant as a result. See, e.g., *United States* v. *Burgos,* 269 F.2d 763, 767 (2d Cir. 1959), cert. denied, 362 U.S. 942 (1960); *United States* v. *Albanese,* 224 F.2d 879, 882 (2d Cir.), cert. denied, 350 U.S. 845 (1955). In the

present case, defendant has failed to demonstrate the existence of the requisite prejudice. Birrell claims that if he had had notice of the government's intention to stand on the inference that Birrell himself mailed the stock certificates to the bank, he would have cross-examined government witnesses in an attempt to refute this inference. We fail to see, however, how defendant's cross-examination of witnesses would have varied if he had been made aware of this method of proof originally. Absent a showing by defendant of how his question would have differed, we must conclude that he has failed to establish the existence of the necessary prejudice.

III. Admission of Evidence of Similar Acts:

Birrell contends that admission into evidence of testimoney concerning the so-called Durham-Schneider and Lieberman frauds were irrelevant and unduly prejudicial. The evidence was admitted by the trial court as evidence of similar acts tending to establish Birrell's criminal intent. The Lieberman fraud provided the basis for the third count, charging wire fraud, upon which Birrell was indicted, but which was subsequently dismissed by the trial court.

According to the government's evidence, in March, 1966, Birrell attempted to interest Jesse Livermore, husband of Patricia Livermore, in purchasing Drug Products stock. Though Livermore himself had no interest in the stock, he agreed to discuss the matter with his friends, and subsequently interested Robert Durham, a friend, and Fritzi Schneider, Livermore's sister-in-law, in making purchases. Later that month Livermore delivered to Birrell two $1,000 checks payable to C. Whitney, in payment for the shares purchased by Durham and Schneider. Birrell then obtained from Re over 200,000 shares ostensibly for the purpose of showing them to prospective purchasers. Birrell turned over 20,000 shares to Livermore for Durham

and Schneider, though Re had not authorized him to make any sales. When Re demanded the shares, Birrell falsely represented to Livermore that there had been a refinancing of Drug Products and the certificates given to Durham and Schneider had to be replaced. Birrell then transferred to Livermore for delivery to the two purchasers 20,000 shares of Drug Products stock in the name of C. Whitney, taken from the same stock book used in the bank fraud for which Birrell was convicted.

The Lieberman fraud concerned the sale of 10,000 shares from the same stock book to one Anthony Lieberman. Birrell was paid the $2,500 purchase price in three installments with the last payment on April 27, 1966, according to testimony presented by the government. The shares involved in this transaction were also issued without authority and therefore were allegedly worthless.

Evidence of similar acts in fraud cases may be introduced where knowledge or intent is at issue, to give rise to an inference of knowledge or intent, or where the actual making of the misrepresentations is at issue, to establish the existence of a larger continuing plan or design. *United States* v. *Freedman,* — F.2d — (2d Cir. June 6, 1971, slip op. 4015). C. McCormick, *Law of Evidence,* § 164 (1964). As to the first category, "[t]his inference does not require that the other representations should have been identical in purport nor made under precisely like circumstances". *Id.* In the present case, given the apparent existence of alternative defense theories, both categories are relevant. If the defense contention that Birrell knew nothing of any wrongdoing and it was only Whitney who was involved in any criminal activity is considered, the second justification for the admission of evidence of similar acts is relevant. If, on the other hand, we take into account the defense theory, argued on appeal, that Birrell was in reality owner of one-quarter of the shares by virtue of his participation in the four-man joint venture arrange-

ment, and thus was acting in totally good faith in using the shares as collateral for the loan, then the former justification serves as a proper basis for admitting the evidence of similar acts. Contrary to defendant's contentions, these transactions were not wholly irrelevant. A jury could properly conclude that they evidenced both a common plan to defraud individuals by means of the transfer of unissued Drug Products stock, and a criminal intent to defraud on Birrell's part.

Birrell further argues that the similar acts are inadmissible, since the government failed to prove even the fraudulent act under indictment, namely Birrell's transfer of the shares to the Cincinnati bank. It is clear, however, that the jury could properly have inferred that it was Birrell himself who mailed to stock certificates to the bank. There was evidence that Birrell had arranged for the loan through the Livermores, that Mrs. Livermore had requested the loan, and that the shares were received by Mr. Davis at the bank.

In arguing against admission of the similar acts evidence of the Lieberman fraud, Birrell relies heavily upon this court's decision in *United States* v. *Wolfson,* 437 F.2d 862 (2d Cir. 1970). There the trial court had dismissed a count for violation of Rule 10b-5, telling counsel that "there is no issue about fraudulent stock sales here and there is no 10b-5 issue". 437 F.2d at 866. Nevertheless, the trial court read to the jury in his charge seven paragraphs of the indictment, including much of the stricken material, to illustrate the means used to carry out the conspiracy. This court, in commenting on that practice, noted: "Thus it would appear that the jury had before it the material purportedly taken out of the case and upon which they could place a criminal connotation". 437 F.2d at 868.

It is true that in this case, the jury was permitted to hear evidence on a count already dismissed. However, here the court dismissed the Lieberman fraud count solely for failure to establish connection of the telephone call with the fraud. In *Wolfson,* on the other hand, the count was dismissed for lack of substantive proof of criminal conduct, but the evidence was before the jury without sufficient instruction that the conduct, non-disclosure, was not in itself criminal.

Moreover, if there had not been a third count, there would be no question of the right to introduce evidence of the Lieberman fraud as similar acts. There was no error in admitting evidence of either fraud.

IV. Insufficiency of the Evidence:

Birrell contends that an inconsistency in the testimony of Jessee Livermore and Re created a reasonable doubt of guilt as a matter of law, and thus dictated acquittal. Livermore testified that he delivered the 20,000 shares of old Begley stock, given originally to Schneider and Durham, on September 9, 1966. These shares were returned to Birrell because Re had been insisting that Birrell return them to him. According to a memorandum of Re, however, as of September 6, 1966, only 10,050 shares were missing. Hence an inconsistency does arise, though in reference only to the similar acts of fraud, and not to the fraud under count two, the subject of the trial.

However, the inconsistency was minor, and the jury could have believed that Livermore was mistaken about the date of redelivery to Birrell, and that Re's memorandum had recorded the proper date. Defense counsel strenuously argued the inconsistency to the jury, and the jury apparently concluded that all that was involved was faulty memory on a comparatively insignificant point. This was a legitimate question for the jury, and we cannot say that the inconsistency created a reasonable doubt as to defendant's guilt as a matter of law.

Appendix A

V. Coercion of the Supplemental Charge:

The argument is made that the trial judge's supplemental charge to the jury after the jury had indicated it was deadlocked unduly coerced the jury into reaching a verdict of guilty. The vote at that time was four votes for guilty, eight for not guilty. In his supplemental charge to the jury, the trial court stated: "I am frank to say that I see no reason why a verdict cannot be reached." Two and one-half hours later, the jury returned a guilty verdict.

This type of charge, called an *"Allen"* charge [see *Allen* v. *United States*, 164 U.S. 492 (1896)], has consistently been upheld by this court. See, e.g., *United States* v. *Bowles*, 428 F.2d 592, 595 (2d Cir. 1970); *United States* v. *Barash*, 412 F.2d 26, 32 (2d Cir.), *cert. denied*, 396 U.S. 832 (1969). In any case, it appears that if any coercive effect would have resulted from the trial judge's *Allen* charge, it would have been aimed towards those who had been voting for a guilty verdict, since at the time the vote was strongly in favor of acquittal.

VI. Hearing of Indictment:

Birrell claims that in this case he is entitled to a hearing to determine whether the specific terms of his indictment were considered by the grand jury. Birrell argues that a hearing is called for, since the government has refused to deny categorically the assertion that the grand jury did not actually pass on the terms of the indictment, since there were amendments made to the bill of particulars by the government, and since there existed what Birrell calls "striking inconsistencies" between the testimony elicited at trial and before the grand jury on the one hand and the terms of the indictment on the other. Birrell's claims, however, are purely speculative. At no time has he demonstrated any possibly concrete factual support for his charge that the grand jury failed to consider the specific terms of the indictment that he might develop at a hearing. There was no need to hold a hearing on this issue.

The judgment of conviction is affirmed.

APPENDIX B

(Judgment of Affirmance of the United States Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of September, one thousand nine hundred and seventy-one.

Present:

Hon. TOM C. CLARK, *Associate Justice.**
Hon. J. JOSEPH SMITH, *Circuit Judge,*
Hon. JOSEPH C. ZAVATT, *District Judge.***

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

LOWELL M. BIRRELL,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

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* Retired Associated Judge of the Supreme Court, sitting by designation.

** Senior District Judge for the Eastern District of New York, sitting by designation.

APPENDIX C

(Constitutional Amendments and Statutory Provisions)

FIFTH AMENDMENT:

The Fifth Amendment of the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

SIXTH AMENDMENT:

The Sixth Amendment of the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which districts shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Appendix C

Title 28, United States Code, Section 1254(1)

Section 1254. Courts of Appeals; Certiorari; Appeal; Certified Questions.

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> > "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

Rule 19, Supreme Court Rules

Rule 19, Considerations governing review on certiorari.

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> > "(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."
> >
> > "(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable deci-

sions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a department by a lower court, as to call for an exercise of this court's power of supervision.

"2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari."

TITLE 18, UNITED STATES CODE, SECTION 1343

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-500

LOWELL M. BIRRELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of having used interstate wire communications in furtherance of a scheme to defraud, in violation of 18 U.S.C. 1343. He was sentenced to two years' imprisonment. The court of appeals affirmed (Pet. App. A).

In essence, the evidence showed that petitioner had without authorization issued stock certificates for 100,000 shares in Drug Products Company, Inc., a virtually defunct corporation, as collateral for a bank loan, misrepresenting that the stock certificates were genuine (Pet. App. A 2-3).

449-007—71

Petitioner argues that it was error to have denied him a hearing on his unsupported allegation that the grand jury never passed on the terms of the indictment, that the giving of an "Allen" charge when the jury was divided 8–4 for acquittal was prejudicial, and that the invocation of the Fifth Amendment privilege against self-incrimination by a witness in response to certain questions on cross-examination denied him the right to confrontation. Each of these contentions is adequately answered by the opinion of the court below on which we principally reply.

We add a few additional comments.

1. In denying a pretrial hearing as to the indictment claim, Judge Frankel correctly pointed out that unlike *Gaither* v. *United States*, 413 F. 2d 1061 (C.A.D.C.) (upon which petitioner heavily relies), where the court reversed a conviction because the jury had voted not upon an indictment but only upon a presentment, the indictment subsequently having been drafted by the United States Attorney's office and signed by the foreman, "the peculiar technique of 'presentment' • • • does not prevail here." *United States* v. *Birrell*, 69 Cr. 583, slip op. 2 (S.D.N.Y.). The government further pointed out in its brief below that shortly before trial Judge Bryan inspected the "True Bill" certificate and read into the record its contents which established that more than the requisite number of jurors had voted for the finding of the indictment (Tr. May 25, 1970, pp. 21–22). Although petitioner questions the sincerity of the government's representations (see Pet.

5–6), we are advised that the custom in the Southern District of New York is for the Assistant United States Attorney to submit a draft indictment to the grand jury and then leave the room before a vote is taken. Thus the prosecution is not personally aware of the number of grand jurors who vote. In such circumstances, reliance on a presumption of regularity is proper, absent any showing to the contrary. As the court of appeals held, petitioner has shown nothing to the contrary, relying only on pure speculation (Pet. App. 10).

2. As to the "Allen" charge, although several circuits have recently determined to eliminate it for the future under their supervisory authority (see, *e.g.*, *United States* v. *Thomas*, No. 22,768, C.A.D.C., *en banc*, decided September 14, 1971), no court of appeals has held that the traditional "Allen" instruction is *per se* coercive or constitutes reversible error. Here, as the court of appeals observed, any coercive effect on minority jurors was favorable to petitioner since the jury was divided 8–4 for acquittal when the charge was given.

3. As to the invocation of the Fifth Amendment privilege by the witness, the court below properly held that this did not deny the right of effective confrontation or require striking the witness' testimony since the invocation of the privilege occurred as to collateral matters at most pertinent for impeachment. See, in addition to the *Cardillo* case cited at Pet. App. A 5, *Fountain* v. *United States*, 384 F. 2d 624, 627–629 (C.A. 5), certiorari denied, 390 U.S. 1005.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1971.

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-500

LOWELL M. BIRRELL,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER LOWELL M. BIRRELL

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER LOWELL M. BIRRELL

This reply memorandum is submitted pursuant to Rule 24, Supreme Court Rules, by petitioner Lowell M. Birrell in further support of his petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Petitioner submits (1) it was error to have denied him a hearing to sustain his charge that the grand jury never passed on the terms of the indictment, (2) that the invocation of the Fifth Amendment privilege against self-incrimination by a government witness in response to certain questions held by the trial court to be material (Tr. 860) on cross-examination denied to petitioner the right to confrontation, and (3) that the giving of an "Allen" charge under any set of circumstances was prejudicial.

We add the following comments in response to the Solicitor General's memorandum in opposition.

I

The government has already admitted in this case (May 25, 1970 transcript p. 6) that the grand jury minutes would not reflect one way or the other, whether the grand jury passed on the actual terms of the indictment. The Solicitor General, in his memorandum in opposition (p. 3), asserts without any reference to the actual trial record that "we are advised that the custom in the Southern District of New York is for the Assistant United Attorney to submit a draft indictment to the grand jury and then leave the room before a vote is taken."

Of course, this is rhetoric.

The fact remains that the Solicitor General has failed to do the simple, decent and required act of either denying the factual charge of the petition that "the" indictment in this particular was never in fact submitted to the grand jury, or to admit to the truth of petitioner's charge under *Brady* v. *Maryland,* 373 U.S. 83 (1963).

The law is very clear. If there is a presumption, it is against the government in this kind of situation. The Solicitor General's statement as to the practice below is completely contrary to fact in this particular case. A hearing as to the truth should be held, or the government should disclose the failure of the grand jury to vote on "this" indictment. *Gaither* v. *United States,* 413 F. 2d 1061 (D.C. Cir., 1969).

II

As to the invocation of the Fifth Amendment privilege by a government witness, the trial court held (Tr. 860) that the matter inquired into was material. So did the government (Tr. 880), under *Brady* v. *Maryland,* 373 U.S. 83 (1963) and *Napue* v. *Illinois,* 360 U.S. 264 (1959). The Court of Appeals based its opinion on the "collateral"

issue theory (Pet. App. A, at p. 3a, *et seq.*). It is the clear law of the case, as established by the trial court, that the question of the ownership of the Drug Products stock was "material." Therefore, it could not be "collateral." The two words are mutually exclusive.

III

As to the "Allen" charge, it is conceded by the Solicitor General that several circuits have recently determined to eliminate it for the future (Solicitor General's memorandum in opposition, at p. 3).

Whatever the trial judge or the Court of Appeals may have thought as to the propriety of the "Allen" charge in this case, if in fact the "Allen" charge is wrong, it justifies a reversal, and not as the Solicitor General proposes, a new procedure for the future.

Otherwise, we have the petitioner now serving two years' imprisonment [1] by accident of geography, by having been tried in the Second Circuit rather than, as the Solicitor General suggests, by way of example, the District of Columbia Circuit.[2] See, also, *United States* v. *Fioravante*, 412 F. 2d 407 (3rd Cir., 1969).

---

[1] The petitioner commenced serving his sentence November 11, 1971, his application for a stay of the mandate being denied by Associate Justice Thurgood Marshall on November 9, 1971.

[2] The jury was divided 8-4 for acquittal when the charge was given.

CONCLUSION

It is respectfully submitted that the Supreme Court must properly grant review on certiorari "[W]here a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter;" (Rule 19, Supreme Court Rules).

Yours, etc.,

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